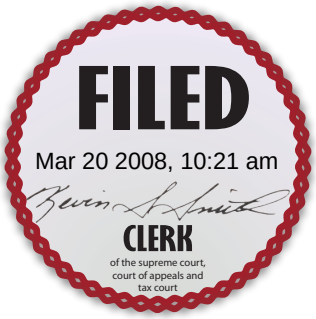

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IN THE COURT OF APPEALS OF INDIANA

HERMAN J. SMILEY,	)	
	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A05-0705-CR-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Russell J. Sander, Judge
Cause No. 73D02-0609-FA-3

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Herman J. Smiley pled guilty to four counts of dealing a controlled substance, heroin,[1] each as a Class B felony, one count of dealing a controlled substance, hydrocodone,[2] as a Class B felony, one count of dealing a controlled substance, oxycodone,[3] as a Class B felony, one count of possession of a controlled substance, heroin,[4] as a Class D felony, one count of corrupt business influence[5] as a Class C felony, and three counts of dealing a look-alike substance,[6] each as a Class C felony. He was sentenced to an aggregate sixteen-year sentence with four years suspended and twelve years executed. He appeals his sentence, raising the following issue: whether the trial court abused its discretion when it sentenced him.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 15, 2006, Smiley sold heroin that he had obtained in Indianapolis to a confidential informant. He again sold heroin, obtained in a similar fashion, to the same confidential informant on April 11, April 14, and April 15, 2006. On March 18, 2006, Smiley sold hydrocodone pills that he obtained from a CVS pharmacy under someone else's prescription to the same confidential informant. On April 10, 2006, Smiley sold oxycodone

[1] *See* IC 35-48-4-2.

[2] *See* IC 35-48-4-1.

[3] *See* IC 35-48-4-2.

[4] *See* IC 35-48-4-7.

[5] *See* IC 35-45-6-2.

[6] *See* IC 35-48-4-4.6.

pills that he obtained in Indianapolis to the confidential informant. All of these transactions occurred within 1,000 feet of a school or park. On April 4, April 15, and May 23, 2006, Smiley sold a look-alike substance, representing the substance to be a controlled substance, to the same confidential informant. During the time period of March 15, 2006 through September 15, 2006, he engaged in a pattern of racketeering. On September 15, 2006, when Smiley was arrested, he was found to be in possession of heroin.

On September, 18, 2006, the State charged Smiley with: four counts of Class A felony dealing a controlled substance, heroin, within 1,000 feet of a school or park; one count of Class A felony dealing a controlled substance, hydrocodone, within 1,000 feet of a school or park; one count of Class A felony dealing a controlled substance, oxycodone, within 1,000 feet of a school or park; one count of Class D felony possession of a controlled substance, heroin; one count of Class C felony corrupt business influence; one count of Class D felony maintaining a common nuisance; and three counts of Class C felony dealing a look-alike substance. Pursuant to a plea agreement, the Class A felony counts were reduced to Class B felonies, and the maintaining a common nuisance count was dismissed. Smiley pled guilty to the reduced B felonies and the remaining counts. His plea agreement contained the following provision:

> If you plead guilty to an offense with sentencing to be determined by the Court, you waive your right to have any court review the reasonableness of the sentence, including but not limited to appeals under Indiana Rule of Appellate Procedure 7(b) and you agree and stipulates [sic] that the sentence of the court is reasonable and appropriate in light of your nature and character.

Appellant's App. at 24 (emphasis in original).

At the sentencing hearing, the trial court found the following aggravating circumstances: Smiley's criminal history; and the nature and circumstances of the crime. *Tr*. at 86. As mitigating circumstances, the trial court found Smiley's cooperation after his arrest and that he admitted to being a drug abuser, but assigned minimal weight to these factors. The trial court then sentenced Smiley to sixteen years for each of his six Class B felony convictions, with twelve years executed and four years suspended, two years for his D felony possession conviction, and six years for each of his four Class C felony convictions. All of the sentences were ordered to run concurrently, for an aggregate sentence of sixteen years with twelve executed and four suspended. Smiley now appeals.

DISCUSSION AND DECISION

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). If the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id*. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id*. Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Id*. This statement must include "a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence," and "[i]f the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*.

Smiley argues that the trial court abused its discretion when it sentenced him because it failed to give its reasoning for the aggravating circumstances found, because it failed to articulate how it balanced the factors in determining his sentence, and because it did not properly consider some of his proposed mitigating circumstances. The State argues that Smiley has waived the right to challenge his sentence because of the provision in his plea agreement. Waiver notwithstanding, the State contends that the trial court did not abuse its discretion when it sentenced Smiley, and it sentenced him properly. We first focus on waiver.

Recently, this court addressed the validity of a defendant's waiver of his right to appeal his sentence in a plea agreement in *Perez v. State*, 866 N.E.2d 817 (Ind. Ct. App. 2007), *trans. denied*. In that case, the defendant's plea agreement contained a provision that stated, "Defendant waives any right to appeal his conviction and sentence in this cause either by direct appeal or by post conviction relief." *Id*. at 819. Additionally, the trial court "expressly reviewed with [defendant] that he was agreeing to waive any right to appeal the sentence to be imposed, that he would not be complaining about the sentence he received as long as it was within the parameters of thirty to fifty years." *Id*. The defendant confirmed to the trial court that this was what he was requesting. *Id*.

On appeal, this court noted that no Indiana decision had previously addressed an express waiver of the right to direct appeal as part of a plea agreement. *Id*. However, this court relied on the principle that plea agreements are contractual in nature and bind the defendant, the State, and the trial court, and found that, "a defendant may in a plea agreement waive his right to a direct appeal of his sentence." *Id*. at 820 (footnote omitted). Importantly,

this court also referenced the Seventh Circuit Court of Appeals for the proposition that "a defendant's appeal waiver is enforceable if made knowingly and voluntarily." *Id*. at 819. Observing that the defendant agreed both in the written plea agreement and in his colloquy with the trial court that he was waiving his right to a direct appeal of his sentence as long as it was within the parameters of the plea agreement, we concluded that his waiver was valid. *Id*. at 820.[7]

Generally, a trial court cannot accept a guilty plea without first determining that the defendant is aware that he is giving up certain rights. *See* IC 35-35-1-2. "Strict compliance with [the] statute is demanded of . . . trial courts in order to determine that any waiver of fundamental constitutional rights is knowingly and intelligently given." *Vanzandt v. State*, 730 N.E.2d 721, 725 (Ind. Ct. App. 2000). The Indiana Constitution grants our Supreme Court "the power to . . . review and revise the sentence imposed" in all appeals of criminal cases and guarantees "an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases." Ind. Const. Art. 7 §§ 4, 6. Our Supreme Court has stated "a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement." *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Additionally, when the trial court retains any discretion in pronouncing sentence on the defendant, he cannot impliedly agree to the

[7] We note that in a subsequent unpublished opinion, a panel of this court relied on the holding of *Perez v. State* to find that a defendant had waived his right to appeal his sentence. *Creech v. State*, No. 35A02-0612-CR-1140 (Ind. Ct. App. Aug. 6, 2007), *trans. granted*. Our Supreme Court granted transfer on the case on September 27, 2007.

appropriateness of a sentence and thereby waive his right to review under Indiana Appellate Rule 7(B). *Rivera v. State*, 851 N.E.2d 300, 301 (Ind. 2006). Because a defendant has a constitutional right to appeal his sentence and because a defendant who pleads guilty in a plea agreement that allows the trial court any discretion in sentencing still retains a right to appeal his sentence, we assume without deciding that the right to appeal a discretionary sentencing decision is equivalent to the other rights a defendant surrenders when pleading guilty. Therefore, like the procedure for relinquishing those other rights, a trial court must ensure during the guilty plea hearing that a defendant is knowingly and intelligently waiving his right to appeal his sentence.

Here, although Smiley's plea agreement contained a provision that purported to waive his right to appeal his sentence, there was no inquiry by the trial court as to whether Smiley was acting knowingly and intelligently when he waived this right. The only mention of this waiver was a brief statement by the State that Smiley's plea agreement was predicated on the waiver of his right to appeal his sentence. *Tr*. at 85. At the sentencing hearing, the trial court actually informed Smiley "you will still have the right of a direct appeal today since this is an open plea on the question of your sentence." *Id*. at 28. We therefore proceed to address Smiley's sentencing argument.

Smiley initially argues that the trial court abused its discretion in finding aggravating circumstances because it failed to articulate its reasons for why it found them to be aggravating. At the sentencing hearing, the trial court found two aggravating circumstances: (1) Smiley's prior criminal record; and (2) the nature and circumstances of the crime. As to the first aggravating factor, the trial court elaborated that it was taking into account as part of

his prior record "the risk that the defendant will commit another crime" and "that we have a 48.6 percent chance of recidivism based on the LSI [Level of Service Inventory]." *Id*. at 86. As to the second, the trial court stated, "I have to take into account the nature and circumstances of . . . the crime. The State has presented evidence that "this would have justified a . . . conviction for a class "A" felony even though the plea agreement reduced down to that . . . ." *Id*. Contrary to Smiley's contention, the trial court did articulate its reasoning as to why it found these factors to be aggravating and did not abuse its discretion.

Smiley also claims that the trial court abused its discretion because it did not consider several mitigating circumstances that he argued at the sentencing hearing. When a defendant alleges that the trial court failed to identify a mitigating circumstance, he is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)). "'If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.'" *Id*. (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)).

Smiley asserts that his young age should have been found to be a mitigating circumstance. "Age is neither a statutory nor a per se mitigating factor." *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001). Smiley was twenty-one years old at the time of sentencing and past the age where youth requires special treatment. *See Corcoran v. State*, 774 N.E.2d 495, 500 (Ind. 2002) (concluding that trial court did not abuse its discretion in failing to find defendant's age of twenty-two as a mitigating factor considering both the seriousness of the crime and the fact that defendant was "well past the age of sixteen where the law requires

special treatment"); *Ketcham v. State*, 780 N.E.2d 1171, 1180 n.6 (Ind. Ct. App. 2003), *trans. denied* (finding that trial court did not err in failing to find defendant's age of twenty as a mitigating factor). We conclude that the trial court did not abuse its discretion when it did not find Smiley's age as a mitigating circumstance.

He next argues that the trial court should have found his guilty plea and his acceptance of responsibility as a mitigating factor. A guilty plea can show an acceptance of responsibility for one's actions. *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999). Generally, when a defendant pleads guilty, it saves court time and spares the victim's family from a full-blown trial. *Id*. "Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." *Id*. Here, Smiley received a considerable benefit from his guilty plea as one felony charge was dismissed, he was allowed to plead to six Class B felonies instead of six Class A felonies, and all of the sentences would run concurrently to each other. Because Smiley received a significant benefit from his guilty plea, the trial court did not abuse its discretion in failing to find this as a mitigating factor.

Smiley also claims that the trial court should have found the fact that he was a drug abuser as a mitigating factor. The trial court did, in fact, find this to be mitigating. At the sentencing hearing, it stated, "I think that there is some mitigation to the fact that the defendant . . . has admitted that . . . he's a drug abuser." *Tr*. at 86. To the extent that Smiley is arguing that the trial court did not give this mitigating circumstance proper weight, we note that we cannot review the relative weight given to mitigating factors. *Anglemyer*, 868 N.E.2d at 491.

Smiley lastly contends that the trial court abused its discretion because it failed to balance the aggravating and mitigating circumstances in making its sentencing decision. This is essentially an argument that the trial court improperly weighed the factors. We can only review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id*. Therefore, the trial court did not abuse its discretion.

Affirmed.

RILEY, J., and MAY, J., concur.